Supreme Court of the United States

October Term, 1975

No. 75-212

UNITED STATES OF AMERICA,
Petitioner,
vs.
THOMAS W. DONOVAN, *et al.*,
Respondents.

BRIEF OF RESPONDENTS MERLO AND LAUER

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the government has the duty to exercise some degree of care in furnishing to the District Court the identity of persons unnamed in a wiretap order whose conversations have been overheard in the course of interception and against whom the government intends to obtain indictments, so that the court may exercise its statutory discretion under 18 U.S.C. §2518(8)(d) to serve persons not named in the interception order with the inventory notice.

2. Whether suppression of a wire interception is justified where through advertence or gross negligence the

government failed to supply the District Court with the names of individuals whose conversations were secretly intercepted, so that the District Court was misled into omitting them from its inventory order, and where the persons whose conversations were intercepted had neither actual notice nor statutory notice of the interceptions and did not learn of the interceptions except in response to their post-indictment discovery motions more than a year after the interceptions occurred.[1]

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The principal relevant statutory provisions are set out in the Appendix to the petitioner's brief at pp. 1a-5a. In addition, this case involves 18 U.S.C. §2515, appended hereto at p. 35, *infra*, and the Fourth Amendment of the United States Constitution which provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

1. The additional question raised in the Petitioner's Brief, concerning the extent of the government's obligation to identify probable subjects of interception in its application for a wiretap order, does not apply to respondents Merlo and Lauer, on behalf of whom this brief is submitted. The District Judge ruled that there was no error in not naming these respondents in the wiretap order (See Brief for the United States, hereinafter sometimes called "Brief" where the context permits, Question Presented No. 1, p. 2 and Statement of Facts, p. 8).

COUNTERSTATEMENT OF THE CASE

History

Respondents Merlo and Lauer were indicted on November 1, 1973, along with respondents Donovan, Robbins and Buzzacco, as well as others not parties to this review, on charges of conspiracy to operate and operation of a gambling business in violation of 18 U.S.C. §§371 and 1955 (App. 17-20).

On November 30, 1973, these respondents filed motions for discovery (App. 4), pursuant to which they learned that the government intended to introduce about twelve telephone conversations, in which they were identified as parties, which had been intercepted by wiretap between December 9, 1972 and January 3, 1973.[2]

Respondents Merlo and Lauer filed motions to suppress these interceptions on December 12, 1973 (App. 131, 133) arguing, *inter alia*,[3] that they had not been served with an inventory notice apprising them of the wire intercepts, in accordance with §2518(8)(d) of Title 18, U.S.C.

2. The government urges that these respondents learned of the interceptions on November 26, 1973 when these papers were "made available to all defendants. . . ." (Brief for the United States, p. 40). However, the court below found that "[t]he only evidence of notice [of the interceptions] in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions." Even if the government's contention on this point were correct, the delay would remain approximately a full year.

3. The motions to suppress filed by Merlo and Lauer also argued that their names were improperly omitted from the wiretap order. The District Judge found that there was "insufficient evidence on the record indicating that the government anticipated interception of their communications . . ." and thus overruled this alternative branch of their motion to suppress (P.C. App. 54a), although it accepted the argument of the remaining respondents that they should have been named in the order.

(*Ibid.*). Their motions were sustained on this ground on January 17, 1974.[4]

The government appealed the decision to the United States Court of Appeals for the Sixth Circuit, which affirmed the District Court's decision on March 17, 1975. On August 8, 1975, the government filed its petition for certiorari in this Court. The petition was granted on February 23, 1976 (App. 179).

Facts

The wiretaps in question were made pursuant to an order entered by a District Judge on November 28, 1972, authorizing interception of communications of six named individuals "and others, as yet unknown" to and from four designated telephones for fifteen days (App. 75-78). On December 26, 1972, additional orders were entered modifying the November 28 order, extending it for an additional fifteen days, and enlarging the surveillance to include an additional named individual and an additional telephone (App. 108-110). Respondents Merlo and Lauer were not named in either the November 28 or the December 26 orders.

On February 21, 1973, a District Judge ordered the government to serve an inventory notice upon thirty-seven persons whose communications had been intercepted (App. 120-121), including many persons who had not been named in the interception order. The names of the persons upon whom the judge directed service of notice had been furnished to the court by an attorney with the Justice Department, who in turn had received

4. The opinion of the District Court for the Northern District of Ohio sustaining the motions to suppress is reproduced in the appendix to the Petition for Certiorari herein (cited "P.C. App."). P.C. App. 54a.

the names from an F.B.I. agent (App. 158). Merlo and Lauer were not among those named in the inventory order and were not served with the required statutory notice.

The list of persons to be served was prepared by the government on the basis that all persons "positively identified" were to be served with notice (App. 153). However, on September 11, 1973, the government filed a motion for an amended inventory order, representing in substance, that two persons, named Harvey Trifler and James Blank, had not been included in the inventory order and had not been served with notice by reason of "administrative oversight" (App. 125). The motion was granted (*Id.*, at 129-130). Merlo and Lauer were neither named in the motion for an amended inventory order, nor did they receive notice pursuant to the amended order.

Merlo and Lauer were well-known to the government and were positively identified suspects in the investigation by not later than January of 1973. The twelve separate conversations involving these respondents were intercepted between December 9, 1972 and January 3, 1973 (App. 159), and led to an F.B.I. search of premises at 21 Olive Street, Akron, Ohio, on January 13, 1972 while Merlo and Lauer were present (App. 160-161). During the suppression hearing, the government witnesses testified that at the time of the search, Merlo and Lauer expressly admitted to the F.B.I., acting under the supervision of the Strike Force, that they had used the tapped phones in the business conducted at the premises (App. 163). Special United States Attorney Edwin Gale admitted, albeit reluctantly, that by January 18, 1973, the tapes of the telephone conversations and the interview reports concerning the incriminating admissions were in the hands of appropriate representatives of the federal government (App. 165). Nevertheless, as the govern-

ment witnesses conceded, Merlo and Lauer never received either "formal" (App. 157, 165) or "informal" (App. 157) notice of inventory.

In his consideration of the motions to suppress filed on behalf of defendants Merlo and Lauer, District Judge Robert B. Krupansky found that "defendants Merlo and Lauer were not served with inventories pursuant to the Act or otherwise notified that they had been intercepted" (P. C. App. 54a), and that "in the interests of justice their communications must be suppressed" (*Ibid.*).

The decision of the District Judge to cause inventory notices to be served on the 37 persons listed in the order of February 21, 1973 (App. 120-121) and the two additional persons listed in the amended order of September 11, 1973 (App. 129-130) was induced by the government's own policies and administrative decisions. The petitioner's brief describes the policy of the Department of Justice as follows:

> "Although more was provided here, it is the Department of Justice's policy to provide the issuing judge *in every case with the name of every person who has been overheard as to whom there is any reasonable possibility of indictment.* Additional names are, of course, provided if requested by the issuing judge." Brief for the United States, p. 39, n. 34. (Emphasis added).

In keeping with this policy, the government attorneys testified that the decision as to whom inventory notices were to be sent was, in effect, made by them.

> Q. ". . . Now, with respect to the service of inventories, how did you reach a conclusion to serve an inventory on a certain individual?"

> A. "Persons who were positively identified during the course of the electronic intercept were served with the inventory."
>
> Q. "And how did you derive that type of information?"
>
> A. "This information was supplied to me by Special Agent Ault." (App. 153; see also App. 154).

There is no suggestion in the record that the government sought any excuse from compliance with its policy in this case, or any lesser standard of furnishing inventory notices.

The record discloses no reason for the omission of notices to Merlo and Lauer.[5] While "administrative oversight" was the reason given to the trial judge for omission of notice to Trifler and Blank (App. 125), the witnesses offered no such reason for failure to list Merlo and Lauer after they had been positively identified, and neither of the courts below made any finding of inadvertence.

Although the government urges that Merlo and Lauer must have received actual notice of the eavesdropping upon their conversations when other defendants received notice (Brief, p. 53), there is no evidence in the record to support this supposition, and the trial judge expressly found that "defendants Merlo and Lauer were not served with inventories . . . *or otherwise notified* that they had been intercepted. . . ." (P.C. App. 54a) (Emphasis added). Nor can actual knowledge be inferred under these circumstances. As the Court of Appeals below noted:

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5. The government's characterization of the omission as "inadvertent" (Brief, pp. 7, 39-40, 45) and "administrative oversight" (Brief, p. 7) is unsupported by record references. Also unsupported is the explanation to the court below that the omission resulted from "an apparent lack of communication between the FBI and the prosecutor." 513 F.2d at 343.

> "Others may have communicated the fact of interception to Merlo and Lauer, but this would not necessarily lead them to believe that they had been intercepted. It is just as reasonable to assume that Merlo and Lauer would believe that, since they had not received notice, their conversations were not intercepted." 513 F.2d at 343.

The Court of Appeals held that the specific finding of the trial court that these respondents had not been "otherwise notified" demonstrated to its "satisfaction that the District Court has considered and decided the issue of actual notice." *Ibid.* The government's contention on that subject is now foreclosed. As the Court below determined:

> "[T]he only evidence of notice in the record is in response to Merlo's and Lauer's motions for discovery, filed after their indictments and more than a year after the actual interceptions. If these defendants had never been indicted, they might well have never received notice of the interceptions." *Ibid.*

SUMMARY OF ARGUMENT

1. Section 2518(8)(d) of the Omnibus Crime Control Act of 1968 requires the judge who issues a wiretap order to "cause to be served, on the persons named in the order . . . and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory." Respondents Merlo and Lauer were not served with such a notice although all other persons overheard and indicted in this case were served. The failure of service was due to the government's negligent or deliberate omission of their names from a purportedly complete list of persons to be

served, which the government had furnished to the Court. The Court below correctly ruled that Section 2518(8)(d) implicitly requires the government to furnish to the trial judge a threshold classification of persons overheard so that the judge can intelligently exercise his discretion to cause service of notice upon them. However, irrespective of the existence of such a duty, in this case the judge would have caused service of notice upon Merlo and Lauer had he not been misled, and as a result, Section 2518(8)(d) was violated.

2. Suppression pursuant to 18 U.S.C. Section 2518(10)(a) is required as the remedy for substantial violations of the inventory notice provisions of Section 2518(8)(d). The inventory notice provisions play a central role in the statutory scheme, and directly implement the congressional intention to limit the use of intercept procedures, in that the inventory notice is the only notice which prevents the wiretap from being totally and perpetually secret, in violation of the Fourth Amendment and the privacy concerns of the framers of Title III of the Omnibus Crime Control Act. Thus suppression is mandated by *United States v. Giordano*, 416 U.S. 505 (1974). A violation of Section 2518(8)(d) results in an unlawful interception within the meaning of Section 2518(10)(a). In view of the foregoing factors, suppression should be available to redress any substantial violation of the inventory notice requirements, irrespective of whether the violation was inadvertent and irrespective of any specific showing of prejudice to the defendant. However, even if a narrower standard of suppression is set by this Court, suppression of the Merlo and Lauer intercepts must stand because the failure to serve them was at least negligent, they never were served with statutory notice, and received no actual knowledge for over a full year, so that the violation of §2518(8)(d) in this case was substan-

tial and prejudice necessarily occurred. Suppression for lack of an inventory notice is also directly required by the Fourth Amendment, and its imposition will cause no undue administrative burden upon the government, which under its current policies already notifies the court of the identity of all persons overheard in wiretaps whom it intends to indict.

ARGUMENT

I. THE GOVERNMENT FAILED TO PERFORM ITS DUTY TO SUPPLY THE DISTRICT COURT WITH SUFFICIENT INFORMATION CONCERNING PERSONS OVERHEARD IN WIRETAPS TO ENABLE THE DISTRICT COURT TO EXERCISE ITS DISCRETIONARY AUTHORITY TO SERVE THEM WITH NOTICE UNDER 18 U.S.C. §2518 (8)(d).

For the reasons expressed in the following paragraphs, (A) the court below correctly ruled that it is the duty of the government to supply the trial judge with at least a minimum amount of threshold information concerning the identity of persons overheard in wiretaps in order to enable the court to exercise its discretionary authority to serve them with notice pursuant to 18 U.S.C. §2518 (8)(d); and (B), irrespective of whether the government has such an obligation, its conduct in this case resulted in a violation of the inventory notice provisions of Title III because it misled the district court in furnishing a list of persons to be served which purported to be complete, but which contained omissions which were at least negligent.

A. Some duty to supply threshold information to the trial judge must rest upon the government.

This case involves the effect of the government's having misled the court into omitting names from the inventory orders by furnishing a purportedly complete list of the names of persons to be served. Although the government asserts that this case presents the question whether the government must "advise the court of the identity of every person whose conversation is overheard in the course of a wire interception" (Brief, p. 2), no such sweeping issue is presented. Even if there were no duty upon the government to volunteer a list of persons overheard, having done so it must be held accountable for the results of its lack of care. However, under the statutory scheme of Title III, the government has an implied duty to furnish at least threshold information to the trial judge concerning persons unnamed in the interception order who have been overheard.

Title III is silent on the duty of the government to inform the court of the identity of persons overheard. It merely provides, in pertinent part, that

> "Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, *and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice*, an inventory which shall include notice of—
>
> (1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted. . . ." 18 U.S.C. 2518(8)(d) (Emphasis added).

It is obvious, as the court below noted, that

"[t]he judge has no independent information as to the unnamed parties who have been overheard on the intercepts and must depend on the Government to disclose that information in order that he may exercise his discretion." 513 F.2d at 342.

For this reason, the government's position that it is not required to assist the court (Brief, pp. 41-42) is untenable. The question is not whether there is a duty, but the extent of the duty.

Although the government urges that the Court below required the identification by name of *all* persons overheard (Brief, pp. 2, 42), it did not do so. It adopted the less onerous standard promulgated in the Ninth Circuit, which requires the government merely to classify the persons overheard for the trial judge by description of the general classes which they comprise, and to supply further detail only if desired by the judge and available to the government. The Court below stated:

"We agree with the following holding in United States v. Chun, 503 F. 2d 533, 540 (9th Cir. 1974):

'[A]lthough the judicial officer has the duty to cause the filing of the inventory, it is abundantly clear that the prosecution has greater access to and familiarity with the intercepted communications. Therefore we feel justified in imposing upon the latter the duty to *classify all those whose conversations have been intercepted, and to transmit this information to the judge.* Should the judge *desire* more information regarding these classes in order to exercise his §2518(8)(d) discretion, we also hold that the government is required to furnish such information *as is available to it.* It is our belief that this allocation of responsibilities between the executive and judicial branches of government will best serve the dual purposes underlying Title III.' (Footnote omitted.)" 513 F.2d at 342-342. (Emphasis added).

The government's assertion that the Court below may have imposed a more rigorous duty than that delineated in *United States v. Chun,* 503 F.2d 533 (9th Cir. 1974), by requiring "precise identification",[6] fundamentally misconcieves the manner in which the *Chun* standard applies to this case. The government concedes that "it is a simple matter for the judge to ask for the names . . . of any such persons, or any other information he desires, in order to exercise his discretion with respect to the service of inventories." (Brief, p. 42). However, where the judge is presented with a purportedly complete list of precisely identified persons, he would have no occasion to ask for any precise identifications which he might desire because such identifications have been furnished already. This conclusion is as true under the *Chun* standard as under any other standard which might be formulated.[7]

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6. Brief for the United States, p. 42, n. 36.

7. Other cases which have denied suppression for failure to serve inventory notices have done so on the basis of the appropriateness of the suppression remedy, rather than on the lack of a governmental duty to supply information. See *United States v. Bohn,* 508 F.2d 1145, 1148 (8th Cir. 1975), *cert. den.,* 421 U.S. 947 (1975); *United States v. Wolk,* 466 F.2d 1143, 1145-1146 (8th Cir. 1972); *United States v. Iannelli,* 477 F.2d 999, 1003 (3d Cir. 1973), *affirmed on other grounds,* 420 U.S. 770 (1975); *United States v. Smith,* 463 F.2d 710, 711 (10th Cir. 1972); *United States v. Rizzo,* 492 F.2d 443, 447 (2d Cir. 1974). These decisions will be more fully discussed at pp. 30-31, *infra.*

B. The government must perform its duty to supply information with some greater degree of care than that exercised in this case.

Whatever standard is employed in prescribing the scope of the government's duty to inform the trial court of persons overheard in a wiretap, the government must be held accountable to exercise it with at least the care to which attorneys are generally held in their representations to the court. And in view of the constitutional underpinnings of the inventory notice provisions of Title III (discussed at pp. 16-25, *infra*, in connection with the appropriateness of suppression as a remedy for failure to serve notice), it would be proper to require the government to exercise a high degree of care. The government concedes that "best efforts" might be an appropriate standard (Brief, p. 44), but its efforts in this case were a sorry "best."

When, in the course of re-examining its list of overheard persons whom it intended to indict, the government discovered that the names of Trifler and Blank had been omitted, a careful examination of the file for other missing names would certainly have been expected. Merlo and Lauer had been positively identified. They were named in tapes and interview reports in the hands of the government.[8] The effort to gloss the lack of notice to them as "administrative oversight" or "inadvertent error" is a euphemism for plain negligence or worse.

For the reasons expressed above, this case provides no occasion for the court to rule upon the scope of the government's duty to provide threshold information as to persons overheard in telephone intercepts under Title III. Even if this Court does determine to announce, in its decision in this case, a rule concerning the government's duty to inform the court, no standard less than that prescribed by *United States v. Chun, supra,* would be sufficient to enable the trial judge to exercise his statutory discretion under 18 U.S.C. §2518(8)(d). However, if the government is held to a lesser degree of diligence in providing such information as the trial court may request, suppression of the Merlo and Lauer intercepts is justified.

8. See pp. 5-6, *supra*.

II. SUPPRESSION OF THE INTERCEPTIONS OF THESE RESPONDENTS' TELEPHONE COMMUNICATIONS WAS REQUIRED.

(A) For the reasons expressed in the following paragraphs, the inventory notice provisions contained in Section 2518(8)(d) occupy a central role in the statutory scheme to limit indiscriminate wiretapping. Suppression is therefore available as a remedy for violation of these provisions both under the precepts of *United States v. Giordano*, 416 U.S. 505 (1974) and (B) under the language of the suppression statutes themselves. (C) Suppression as a remedy for lack of an inventory notice should not depend upon whether the government's failure to serve the notice was deliberate or inadvertent, or upon whether specific prejudice to the defendant has been shown. (D) However, in any event the violation of the inventory notice requirements presented by this case was substantial and necessarily prejudicial to these respondents. (E) Moreover, the Fourth Amendment requires the suppression of wiretaps where post-interception notice is lacking. (F) Finally, the imposition of suppression as a remedy for substantial violations of the inventory notice requirements will present no serious problems to the government in the administration of Title III.

A. The inventory notice provisions occupy a central role in the statutory scheme to limit indiscriminate wiretapping, so that suppression is available as a statutory remedy for lack of the notice under the precepts of United States v. Giordano.

Section 2518(10)(a) of Title III provides for suppression of an intercepted communication on the following grounds:

"(i) the communication was unlawfully intercepted;

"(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

"(iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. §2518(10)(a).

In *United States v. Giordano*,[9] this Court held that the words "unlawfully intercepted" in subsection (i) quoted above were "not limited to constitutional violations" 416 U.S. at 527, and that

> "Congress intended to *require suppression* where there is failure to satisfy *any* of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.*, at 527 (Emphasis added).

In *Giordano*, this Court held that the statutory provisions which "condition the use of intercept procedures upon the judgment of a senior official in the Department

9. 416 U.S. 505 (1974).

of Justice" (*Id.*, at 528) were "intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored." *Ibid.*

The legislative history of the inventory notice provisions set out in Section 2518(8)(d) demonstrates that these provisions occupy no less a central role in the prevention of unconstitutional and unlawful uses of the "extraordinary investigative device"[10] authorized by Title III.

Senate Report No. 1097, 90th Cong., 2d Sess. (1968), the "principal piece of legislative history" concerning Title III, to which this Court has repeatedly referred in its adjudications under the Omnibus Crime Control Act[11] discloses that the framers of Title III regarded the inventory notice provisions as fundamental to the Fourth Amendment validity of the Act.

In *Berger v. New York*, 388 U.S. 41 (1967), this Court applied the Fourth Amendment's prohibition of unreasonable searches and seizures to wiretaps and electronic eavesdropping, and invalidated New York's eavesdropping law for failure to meet Fourth Amendment criteria. One of the specific fatal defects noted in *Berger* was that:

> ". . . the statute's procedure, necessarily because its success depends on secrecy, *has no requirement for notice as do conventional warrants*, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits uncontested entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice would appear more important in eavesdropping, with its in-

10. *United States v. Giordano*, 416 U.S. 505, 527 (1974).

11. *Giordano, supra*, at 528-529.

herent dangers, than that required when conventional procedures of search and seizure are utilized. *Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties.* In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures." (Emphasis added). *Id.*, at 60.[12]

A few months after its *Berger* decision, this Court struck down a federal warrantless search, in part, because the searching officers were not

> "directed, after the searching had been completed, to notify the authorizing magistrate *in detail of all that had been seized.*" *Katz v. United States*, 398 U.S. 347, 356 (1967). (Emphasis added).

The framers of Title III expressly declared their intention to adopt and follow the constitutional guidelines of both *Berger* and *Katz*.

> "Working from the hypothesis that any wiretapping and electronic surveillance legislation should include the . . . constitutional standards [of *Berger* and *Katz*], the sub-committee has used the *Berger* and *Katz* decisions as a guide in drafting Title III." Senate Report (Judiciary Committee), No. 1097, 2 U.S. Code Congressional and Administrative News 1968 p. 2112, at p. 2163.

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12. Many years earlier this Court had condemned the "secret" taking of property, and the illegal use of "stealth" as constituting Fourth Amendment violations no less than illegal use of force. *Gouled v. United States*, 255 U.S. 298, 305-306 (1921). While *Gouled* has been narrowly overruled insofar as it prohibits seizure of "mere evidence", see *Warden v. Hayden*, 387 U.S. 294 (1967), its denunciation of secret intrusions upon privacy remains undisturbed.

The requirement "to notify the authorizing magistrate, after the search, of all that had been seized" found lacking in *Katz*, was one of the constitutional standards specifically noted by the sub-committee. *Id.*, at 2162. Accordingly, the portion of the section-by-section analysis, contained in the Senate Report 1097, on subparagraph (8)(d), describes the purposes of the inventory notice in mandatory and constitutional terms:

> "Subparagraph (d) places on the judge the duty of causing an inventory to be served by the law enforcement agency on the person named in an order authorizing or approving an interception. This reflects existing search warrant practice. See Federal Rules of Criminal Procedures, 41(c); *Berger v. New York*, 87 S. Ct. 1873, 388 U.S. 41 (1967); *Katz v. United States*, 88 S. Ct. 507, 389 U.S. 347 (1967). The inventory must be filed within a reasonable period of time, but not later than 90 days after the interception is terminated. It must include notice of the entry of the order, the date of its entry, the period of authorized or approved interception, and whether or not wire or oral communications were intercepted. On an ex parte showing of good cause, *the serving of the inventory may be, not dispensed with, but postponed.* For example, where interception is discontinued at one location, when the subject moves, but is reestablished at the subject's new location, or the investigation itself is still in progress, even though interception is terminated at any one place, the inventory due at the first location could be postponed until the investigation is complete. In other situations, where the interception relates, for example, to a matter involving or touching on the national security interests, it might be expected that the period of postponement could

be extended almost indefinitely. Yet the intent of the provision is that *the principle of postuse notice will be retained. This provision alone should insure the community that the techniques are reasonably employed. Through its operation all authorized interceptions must eventually become known at least to the subject.* He can then seek appropriate civil redress for example, under section 2520, discussed below, if he feels that his privacy has been unlawfully invaded." *Id.*, at 2194 (Emphasis added).

The Senate Report echoes earlier conclusions of the President's Commission on Law Enforcement and Administration of Justice, the recommendations of which sparked the enactment of Title III. After discussing the particular perniciousness of the surreptitious character of electronic surveillance, and the general Fourth Amendment requirement that "all searches must be on notice," the Commission concluded

"There is no reason why some sort of inventory procedure applicable to electronic surveillance warrants could not be worked out. Warrant procedures prior to use of electronic equipment and *inventory procedures subsequent to its use would help limit the indiscriminate use of the devices.* More importantly, they would make possible prior and subsequent judicial review of their use and possible abuse." *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime,* 80, 97, 103 (1967) (Emphasis added).

The President's Commission had commissioned Professor Robert Blakely of Notre Dame Law School to prepare a draft statute on wiretapping, and the Blakely draft contained provisions for notice to the subject that wire-

tapping or eavesdropping has taken place. 114 Cong. Rec. 14475 (1968). Reading from and commenting on a subcommittee report on the Blakely draft during the floor consideration of Title III, Senator Long remarked on the significance of the inventory notice provisions as follows:

"This provision, though unique in this area, may be derived from an analogous procedure in the area of searches and seizures, where the inventory functions as a receipt for what was taken. *The principal significance of the inventory in this area, however, is that it lifts the secrecy from the tap or bug.* Presumably the intention is thus to reduce the uncertainty which one might have as to whether or not he has been subjected to electronic surveillance.

"We approve of this provision, and believe it should be a part of the legislative scheme recommended by this Report." *Ibid.* See also Senator Hart's remarks, *id.* at 14485-86.

Thus, the critical distinction between the inventory and return in a conventional search and the inventory notice of electronic surveillance emerges from the Senate deliberations. While protecting important interests in accounting for what is seized, the inventory in a conventional search is not essential to provide notice of the search and prevent intolerable secret intrusions into privacy.[13] Without such provisions, however, Title III could not pass constitutional muster under the opinions of this

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13. This factor distinguishes the cases, referred to by the government at page 55 of its Brief, upholding conventional searches despite "ministerial" failure to deliver a return and inventory. See *United States v. Dudek,* 530 F.2d 684 (6th Cir. 1975); *United States v. Hall,* 505 F.2d 961 (3d Cir. 1974); *United States v. Harrington,* 504 F.2d 130, 134 (7th Cir. 1974); *United States v. McKenzie,* 446 F.2d 949 (6th Cir. 1971); *Evans v. United States,* 242 F.2d 534 (6th Cir. 1957).

Court in *Berger* and *Katz* and in the minds of the congressional framers.

As the government has noted,[14] the particular provision at issue in this case, which gives the trial court discretion to serve notice upon persons not named in the order, was added by amendment on the Senate floor. Amendment No. 754, 114 Cong. Rec. 14485-14486 (1968). However, the government seeks to escape the implication of the floor consideration of this amendment. Like the mandatory notice to persons named in the order, the discretionary notice was regarded as "important" (*Id.* at 14485) and necessitated by the *Berger* and *Katz* decisions under the Fourth Amendment which "established that notice of surveillance is a constitutional requirement of any surveillance statute." *Ibid.*

The government's contention on this point is misleading. The government argues in effect, that congressional concern for discretionary notice has been rendered unimportant because "[m]andatory notice only to those named in the order has since been held to satisfy the Constitution." Brief, pp. 43-44, n. 38 citing *United States v. Ramsey*, 503 F.2d 524, 531 n. 24 (7th Cir. 1974), *cert. den.*, 420 U.S. 932 (1975); *United States v. Tortorello*, 480 F.2d 764, 774 (2d Cir. 1973), *cert. den.*, 414 U.S. 866 (1973); *United States v. Whitaker*, 474 F.2d 1246 (3d Cir. 1973), *cert. den.*, 412 U.S. 953 (1973); *United States v. Cafero*, 473 F.2d 489, 498-500 (3d Cir. 1973), *cert. den.*, 417 U.S. 918 (1974); *United States v. Cox*, 462 F.2d 1293, 1303-1304 (8th Cir. 1972), *cert. den.*, 417 U.S. 918 (1974); *United States v. Cox*, 449 F.2d 679, 685, 687 (10th Cir. 1971), *cert. den.*, 406 U.S. 934 (1972). To be sure, these cases generally approved the constitutionality of Title III, which provides for mandatory notice only to persons named in the order. However, Title III also provides for discretionary notice to others who may have been overheard, and none of these cases held that discretionary notice to such persons is constitutionally unnecessary or unimportant to the legislative scheme.

14. Brief for United States, p. 43, n. 38.

In the light of the legislative history discussed above, federal appellate courts have in fact held that §2518 (8)(d) is an "integral part of the system of limitation [in Title III] designed to protect privacy,"[15] the wording of which "implements the Fourth Amendment;"[16] that "the inventory notice provision is a central or at least a functional safeguard in the statutory scheme."[17] In the words of the court below, "the inventory notice provisions have a centrol role in limiting the use of intercept procedures." 513 F.2d at 344. These cases accordingly applied the suppression remedy for violation of Section 2518(8)(d) in keeping with the holdings of this Court in *United States v. Giordano*, 416 U.S. 505 (1974), as reaffirmed in *United States v. Chavez*, 416 U.S. 562 (1974) and *United States v. Kahn*, 415 U.S. 143 (1974).

B. The violation of the inventory notice requirements renders the communication unlawfully intercepted within the suppression provisions of Sections 2515 and 2518(10)(a).

While the government argues that it would require excessive "stretching" to hold that a "communication was unlawfully intercepted" for purposes of the suppression

15. *United States v. Eastman*, 465 F.2d 1057, 1062 (3d Cir. 1972), quoting 1968 U.S. Code Cong. and Adm. News, at pp. 2184-2185.

16. *Id.* at 1063.

17. *United States v. Chun*, 503 F.2d 533, 542 (9th Cir. 1974); see also *United States v. Civella*, 19 Cr. L. 2136, 2137 (8th Cir. Nos. 75-1525, 1528, 1530, 1532, April 16, 1976).

sanction of Section 2518(10)(a)(i),[18] in fact no stretching at all is required. As the government appears to concede[19] and as the Court of Appeals for the Third Circuit has held,[20] Section 2518(10)(a)(i) must be read in conjunction with §2515 which provides, *inter alia*:

> "Whenever any wire or oral communication has been intercepted, *no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial* . . . before any court . . . *if the disclosure of that information would be in violation of this chapter.*" (Emphasis added).

Section 2515 alone has been held by this Court to require the exclusion of wiretaps which violate Title III even where a motion to suppress would be inapropos. See *Gelbard v. United States*, 408 U.S. 41 (1972). The reasoning of the Court of Appeals for the Third Circuit in *United States v. Eastman* is, in essence, that an interception which is not followed by compliance with the inventory notice provisions of Section 2518(8)(d) is "in violation of this chapter" (465 F.2d at 1062) and thus an unlawful interception for purposes of Section 2518(10)(a)(i).[21] This result is suggested by this Court's formulation, in *Giordano*, that suppression is required under §2518(10)(a) for violations (which are not limited to those of constitutional dimension, 416 U.S. at 527) of "*any* of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures."[22]

18. Brief, p. 46.

19. *Ibid.*

20. *United States v. Eastman*, 465 F.2d 1057, 1061 (3d Cir. 1972).

21. The complete reasoning of *Eastman* is that

> "[i]n order to determine if 'the disclosure of that information [i.e., the contents of the interception] would be in violation of this chapter,' we look to §§2511, 2517, and 2518(8)(d). Section 2511 prohibits any willful use of an interception 'except as otherwise specifically provided in this chapter.' Section 2517(3), . . . is an exception to §2511 and allows the disclosure of a wiretap at trial if 'intercepted in accordance with the provisions of this chapter.' Since the interception in this case was not in accordance with the provisions of this chapter, i.e., §2518(8)(d), as discussed above, it follows that

(*Footnote continued on following page*)

C. Suppression for lack of an inventory notice should not depend upon advertence or prejudice.

As at least three federal courts have now reasoned, a showing of prejudice to the defendant or advertent[23] omission of the notice is unnecessary to the availability of the suppression remedy.

In *United States v. Chun*, 503 F.2d 533 (1974), the Court of Appeals reversed the suppression order and remanded the case to the District Court for further consideration in the light of the holding of *United States v. Giordano*[24] that violations of "central" safeguards require suppression, and the statement in *United States v. Chavez*,[25] that *Giordano* did not "suggest that every failure to comply fully with any requirement provided in Title III would render the interception . . . 'unlawful.'" 503 F.2d at 542-

Footnote continued—

> the disclosure of the contents of the wiretap was in violation of this chapter, i.e., 'a willful use of an interception under §2511 and the statutory rule would apply here.'" 465 F.2d at 1062, quoting, in part, *United States v. Narducci*, 341 F. Supp. 1107, 1117 (E.D. Pa. 1972).

22. 416 U.S. at 527 (Emphasis added).

23. In *United States v. Eastman*, 465 F.2d 1057 (3d Cir. 1972), suppression flowed from the trial judge's deliberate waiver of the inventory notice requirement.

24. 416 U.S. 505 (1974).

25. 416 U.S. 562, 574 (1974).

543. On remand, the District Court held that "the judicial officer in the exercise of his discretion could not constitutionally exclude unnamed but overheard *prospective defendants* from the inventory notice . . .";[26] that failure of the government to notify the court "that these unnamed individuals had been overheard and that they were prospective defendants"[27] violated both the "spirit and the letter" of the inventory notice clause, which is a "central or functional safeguard" requiring suppression under *Giordano* precepts; and that the "reason why the judicial officer did not order inventory notice to be given . . . is immaterial." *United States v. Chun,* 386 F. Supp. 91, 96 (Hawaii Dist. 1974).

In *United States v. Civella,*[28] the Court of Appeals for the Eighth Circuit concluded that its prior decision which denied suppression for violation of the inventory notice requirement in the absence of prejudice, *United States v. Wolk,*[29] was decided prior to this Court's rulings in *Giordano* and *Chavez* and "perhaps too much reliance should not be placed on it today." (Slip Op. p. 22). The *Civella* opinion considered the decisions of this Court to date as requiring that

> "where there is a substantial violation of a central and significant provision of the Act, suppression may be required even where the government has acted in good faith and the party whose communications have been intercepted has sustained no actual prejudice as a result of the violation." Slip Op. p. 10.

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26. *United States v. Chun,* 386 F. Supp. 91, 96 (Hawaii Dist. 1974).

27. *Ibid.*

28. 19 Cr. L. 2136, Case Nos. 75-1522, 1525, 1528, 1530, 1532 (8th Cir. April 16, 1976).

29. 466 F.2d 1143 (8th Cir. 1972).

Agreeing with *Chun, supra,* and the Court below, that Section 2518(8)(d) is such a central provision, it granted suppression for lack of substantial compliance with its provisions.

The court below came to a similar conclusion.

> "Either the Government's *deliberate circumvention,* see *United States v. Eastman,* 465 F.2d 1057 (3d Cir. 1972), or an *inadvertent error* may require suppression. Although certain cases decided prior to *Giordano* and *Chavez* indicate that, in the absence of actual notice, the prejudice to the defendants is a factor to be considered, see *United States v. Cirillo,* 499 F.2d 872, 882-883 (2d Cir. 1974); *United States v. Wolk,* 466 F.2d 1143, 1146 (8th Cir. 1972), *Giordano* states that if the provision plays a 'central role' that 'suppression must follow when it is shown that this statutory requirement has been ignored.' 416 U.S. at 529, 94 S.Ct. at 1832." 513 F.2d at 343. (Emphasis added, footnote omitted).

The reasoning of these federal decisions is compelling. For as this Court also noted in *Giordano,* the purpose of Title III was "effectively to prohibit . . . all interceptions of oral and wire communications except those specifically provided for in the Act. . . ." 416 U.S. at 514. And this Court has held that the *"fundamental policy* adopted by Congress on the subject of wiretapping and electronic surveillance . . . is *strictly* to *limit* the employment of those techniques of acquiring information. . . ." *Gelbard v. United States,* 408 U.S. 41, 57 (1972) (Emphasis added). "[A]lthough Title III authorizes invasions of individual privacy under certain circumstances, *the protection of privacy was an overriding congressional concern." Id.,* at 48 (Emphasis added, footnote omitted).

The congressional purposes noted by this Court would hardly be served by any rule which places upon the defendant, against whom the fruits of surreptitious surveillance are being used, the onus of establishing the generally unknowable facts concerning the government's state of mind in failing to notify him of the eavesdropping, or of establishing that he has been especially prejudiced by the lack of notice of the secret electronic search.[30] It should suffice that he has been denied the protection of the central safeguard which Congress thought "should insure . . . that the techniques are reasonably employed."[31]

D. The violation of the inventory notice requirements in this case was substantial and prejudicial.

There is strong reason for this Court to rule that any significant violation of Section 2518(8)(d) justifies suppression of the wiretap. See argument at pp. 25-27, *supra*.

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30. It is not unknown for a federal agent applying for a wiretap order deliberately to mislead a judge. See *United States v. Bellosi*, 501 F.2d 833, 835 (D.C. Cir. 1974). The defendant's remedy should not depend upon his ability to ferret out deception by law enforcement personnel.

31. 2 U.S. Code Cong. and Admin. News, p. 2144 (1968). The contrary position of the drafters of the *Commentary on Standards Relating to Electronic Surveillance, American Bar Association Project on Minimum Standards for Criminal Justice* (Approved Draft 1971, p. 160), that "[a] failure . . . to file the inventory . . . should result in the suppression of evidence only where prejudice is shown" is ill conceived. The Commentary, which unlike the black type standards was not approved by the House of Delegates, and therefore constitutes only the predilections of a majority of the drafting committee, is based (at p. 160) on *Evans v. United States*, 242 F.2d 534 (6th Cir. 1957), *cert. den.*, 353 U.S. 976 (1957). *Evans* dealt with a conventional search, not a Title III intercept. Since the conventional inventory does not fulfill the Title III inventory's function of lifting secrecy from the search, the reference to *Evans* manifests a serious misconception of the statutory scheme.

However the government's failure to serve inventory notices on Merlo and Lauer requires suppression even under a narrower view of this remedy.

The Court below held that "[t]here is *no suggestion* in the present case that the Government fulfilled its duty under the statute *or that there was even a colorable conformity with the statutory requirements.*" 513 F.2d at 343.[32] Under comparable circumstances where there was no effort to serve an inventory notice upon one of several defendants, even though others had been served, the Court of Appeals for the Eighth Circuit has held that suppression must result. *United States v. Civella*, 19 Cr. L. 2136, 2137 (8th Cir., April 16, 1976).[33] In so holding, the *Civella* court differentiated such total failure from brief delay, which it held does not require suppression (*Ibid.*). In *Civella*, the court also came to a contrary result from its previous inventory notice ruling, in which it denied suppression where there was a few months' delay between the tap and notice or knowledge to the defendants on the basis that "the statute has been substantially complied with. . . ." *United States v. Wolk*, 466 F.2d 1143, 1144, 1146 (8th Cir. 1972) (see further discussion of *Wolk* at p. 31, n. 36, *infra*).

Respondents Merlo and Lauer never received an inventory notice and did not have actual knowledge of the interceptions for more than a year after they took place.[34]

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32. Failure to include Merlo and Lauer in the list was at least negligent. See pp. 5-7, *supra*. The government's reference at Brief pp. 53-54, to the dictum in *Michigan v. Tucker*, 417 U.S. 433, 447, and *United States v. Peltier*, 422 U.S. 531 (1975), concerning the unimportance of the deterrence rationale where official action is in good faith is thus misplaced.

33. Case Nos. 75-1522, 1525, 1528, 1530, 1532.

34. As the Court below noted. 513 F.2d at 343.

While the government urges that Merlo and Lauer were not prejudiced by the delay (Brief, p. 45), this contention is specious. It defies belief that these persons and their counsel could not have employed to their defensive advantage the timely knowledge that they were under the surveillance of law enforcement authorities. Moreover, this delay of more than a full year had the necessary effect of rendering stale any defense investigation of the circumstances and events existing at the time of the clandestine surveillance. Witnesses become unavailable or unfriendly. Documents are discarded. The memory of exculpating circumstances fades. If these respondents had known of the wiretaps in a timely manner they would have understood that an investigation was focused on them in February of 1973, when the notice was served (App. 120-121), instead of the following November when they were indicted; and their counsel could have commenced preparations almost a year earlier.

In the cases cited by the government (at p. 41 of its Brief) the denial of suppression was based upon innocuous facts which did not amount to substantial violations of the inventory requirements, and are in no way comparable to the substantial violation presented in this case.

Thus suppression has been denied because the defendant acquired knowledge of the intercepts within the statutory ninety-day period,[35] where there has been substantial

35. *United States v. Iannelli*, 477 F.2d 999, 1003 (3d Cir. 1973) *affirmed on other grounds*, 420 U.S. 770 (1975). This fact was commented on in the remand opinion in *United States v. Chun*, 386 F. Supp. 91, 95 (D. Hawaii 1974), as the distinguishing feature justifying suppression in *Chun*. See also the District Court opinion in *Iannelli*, 339 F. Supp. 171 (W.D.Pa. 1972). Actual notice within ninety days was also one of the bases for sustaining the intercept in *United States v. Smith*, 463 F.2d 710 (10th Cir. 1972). Actual knowledge was found lacking in the instant case.

compliance with the statute and only brief delay of one or two months beyond the statutory period[36] or less.[37]

The law pertaining to suppression of interceptions for lack of inventory notice, as thus far developed by these federal appellate decisions, has in no instance sustained a wiretap where there has been (i) lack of even colorable compliance with Section 2518(8)(d) as to a particular defendant, or (ii) long delay. In the instant case, there was both total lack of even colorable compliance or actual notice, and a protracted delay from which prejudice can be inferred.

Based upon the foregoing considerations, if this Court should deem it appropriate to construe the suppression remedy as available only where lack of colorable compliance, negligence of the government, or prejudice are shown, the suppression of the Merlo and Lauer wiretaps must nevertheless stand.

E. Suppression is required by the Fourth Amendment.

As previously discussed, the inventory notice requirement of Section 2518(8)(d) "implements the Fourth Amendment"[38] which, as this Court has held in *Gouled*,

36. *United States v. Wolk*, 466 F.2d 1143 (8th Cir. 1972) (inventories ordered served in June; actual knowledge obtained in July or August); *United States v. Rizzo*, 492 F.2d 443 (2d Cir. 1974). The circumstances of the delay are not described in the opinion in *United States* v. *Bohn*, 508 F.2d 1145, 1148 (8th Cir. 1975), but the Eighth Circuit position that suppression follows substantial notice violations is made clear in *United States v. Civella, supra*.

37. In *United States v. Smith, supra*, actual knowledge during the period was followed by statutory notice a mere thirty hours late, and the Court so noted. 463 F.2d at 711.

38. *United States v. Eastman*, 465 F.2d 1057, 1063 (3d Cir. 1972).

Berger and *Katz*, is severely offended by secret searches without notice. The victim of such a search is deprived of his Fourth Amendment rights by any substantial failure to notify him irrespective of the advertence of the failure, or any prejudice in subsequent criminal proceedings.

Where wiretapping is involved, the post-search inventory notice constitutes the only notice of the search. Thus, contrary to the govérnment's contentions (Brief, p. 50), the judicially created exclusionary rule under the Fourth Amendment requires no extension to support the suppression of any wiretap where there has been a substantial failure to notify the defendant.[39] Suppression is mandated by the exclusionary rule of *Weeks v. United States*, 232 U.S. 383 (1914) and *Mapp v. Ohio*, 367 U.S. 643 (1961).

F. Suppression as a remedy for substantial violations of the inventory notice requirements should present no serious problems in the administration of Title III.

In its appraisal of the availability of suppression as a remedy for improper wire interception procedures, this Court has considered whether suppression would "greatly subvert the effectiveness of the law enforcement mechanism that Congress created." *United States v. Kahn*, 415 U.S. 143, 153 (1974). Suppression has been upheld to enforce the requirement of proper Justice Department authorization to the applicant for an intercept order—a matter well within the government's control. *United States v. Giordano*, 416 U.S. 505 (1974). Conversely, suppression

39. There is thus no need to "press the scope of the suppression remedy beyond present search and seizure law. . . ." Suppression for lack of an inventory notice is within the pattern contemplated by the framers of Title III. S. Rep. No. 1097, *supra*, at p. 96.

has been denied where the effect would have been to require thorough prior investigation of all persons likely to use the phone. *United States v. Kahn, supra.*

Suppression in the instant case creates no administrative burdens for the government beyond the exercise of a degree of care in the administration of its obviously prudent policy of providing "the supervising judge with the name of every person who has been overheard if there is any reasonable possibility that the person will be indicted." (Petition for Certiorari herein, p. 15).

The Court below expressly found that "this is not a case where a strict interpretation of the statute would render the statute essentially useless for law enforcement purposes as in *United States v. Kahn*. . . ." 513 F.2d at 343. It is thus possible to give effect to the congressional purposes of "protecting individual privacy"[40] without destroying the wiretap as a weapon against organized crime.[41]

Almost a decade ago, this Court recognized that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41 (1967). In order to limit the pernicious secrecy attendant upon wiretapping, which this Court has repeatedly addressed with gravest concern, it is necessary that strict compliance with the inventory notice provisions be required. The rulings below suppressing the intercepts for lack of notice to respondents Merlo and Lauer should remain undisturbed.

40. *United States v. Kahn*, 415 U.S. 143, 151 (1974).

41. *Ibid.*

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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APPENDIX

18 U.S.C. Section 2515

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 216.